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No. 121, Original

In The

Supreme Court of the United States

October Term, 1994

STATE OF LOUISIANA

Plaintiff,

v.

STATE OF MISSISSIPPI, et al.,

Defendants.

EXCEPTIONS OF THE STATE OF LOUISIANA TO THE FINAL REPORT OF THE SPECIAL MASTER AND PETITION FOR NEW TRIAL OF THE SUPPLEMENTAL HEARING

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32 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. MOTION FOR ORAL ARGUMENT 4

III. PETITION FOR NEW TRIAL OF THE SUPPLEMENTAL HEARING 4

IV. EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER 5

V. ARGUMENT

A. Statement of the Case 7
B. The Applicable Law of Thalweg Boundaries 11
C. Treatment of Expert Testimony 14

VI. CONCLUSION 28

TABLE OF AUTHORITIES

Page

Arkansas v. Tennessee, 246 U.S. 158 (1918) 13
Arkansas v. Tennessee, 397 U.S. 888 (1970) 13, 23
Borax Consolidated v. City of Los Angeles, 296 U.S. 10, 56 S.Ct. 23, at 29 (1935) 18
Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098 (1943) 19
Carrick v. Lamar, 116 U.S. 423 (1886) 20
City of St. Louis v. Rutz, 138 U.S. 226 11 Sup. Ct. 337, at 346 (1891) 19, 22
Houston v. Thomas, 937 F.2d 247 (5th Cir. 1991) 24, 28
Indiana v. Kentucky, 136 U.S. 479 508–509 (1890) 13
Louisiana v. Mississippi, 466 U.S. 96 (1984); 384 U.S. 24 (1966), reh'g denied, 384 U.S. 958; 282 U.S. 458 (1931); and 202 U.S. 1 (1906) 12
Missouri v. Kentucky, 78 U.S. 395, 401 (1870) 13
Tennessee v. Arkansas, No. 77, Original 15, 23
Texas v. Louisiana, 410 U.S. 714, 93 S.Ct. 1215 (1973), at page 1221 18
Scott v. Lattig, 227 U.S. 229, 33 S.Ct. 242 (1913) 18
United States v. United States Gypsum Company, 333 U.S. 364 at 395, 92 L.Ed. 746, 68 S.Ct. 525 at 542 (1948) 29
W.S. Shamban & Company v. Commerce and Industry Company, 475 F.2d 34 (1973) 29

STATUTES

Rule 52(a) Federal Rules of Civil Procedure 29
43 U.S.C. 1301 ..... 6, 18

GOVERNMENTAL DOCUMENTS

Manual of Instructions for the Survey of the Public Lands of the United States, 1973, Bureau of Land Management Technical Bulletin 6, United States Department of the Interior, page 22 (LA-SE-122) 19
U.N. Convention on the Territorial Sea and Contiguous Zone, Article X 18

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I.

INTRODUCTION

Pursuant to Order entered by this Court on November 14, 1994, receiving the Report of the Special Master and granting permission for the filing of Exceptions, the State of Louisiana, through its Attorney General, files Exceptions to the determinations made by the Special Master. Additionally, the State of Louisiana files a Petition for New Trial of the Supplemental Hearing held before the Special Master in consequence of the Final Report rendered by him.

At the outset, it should be stated that this matter has been in progress since 1986 and the Final Report of the Special Mas-

ter provides an excellent review of the history of the case in the District Court, the Court of Appeals for the Fifth Circuit and this Court, including the testimony and exhibits introduced, as well as a detailed procedural history of this action.

As can be seen from Appendix "C" attached to the Final Report of the Special Master, the transcript of the Supplemental Hearings was more extensive than the original trial, and the additional exhibits offered were indeed voluminous. The Special Master, ably assisted by Ms. Susani Douville, did a careful job of the accessioning of these additional items of evidence and insured that they were correctly marked, identified and maintained during these proceedings.

Unfortunately, the Special Master has apparently misunderstood and, therefore, totally misconstrued the facts presented before him, much of which was a supplementation of prior testimony, but with many additional exhibits offered by Louisiana (which carefully and explicitly depicted the progression of events within the Lake Providence reach of the Mississippi River over the entire period of recorded history). In essence, the Special Master has returned this Court to the same posture the case was in at the time of the District Court decision, which was completely reversed by the Court of Appeals for the Firth Circuit, on August 5, 1991, by relying upon the original findings of the District Court. This, despite overwhelming evidence and testimony from supplemental witnesses for Louisiana of national and international standing (Dr. Easterly, Mayeux and Winkley), as well as lay witnesses. Mississippi and the Houston Group presented only two previous witnesses, Austin Smith and Robert Jarvis, and a forester.[1]

[1] The prepared testimony of the supplemental witnesses provides a foundation for the trial testimony to follow at the supplemental hearing on September 12, 1994.

As will be pointed out in the Exceptions below, the Special Master has committed clear error in the findings presented and has disregarded the essential meaning of the only conclusive pieces of evidence, as well as applicable law, which were available in formulating his final report. The Special Master, like the District Court, adopted the "Austin Smith Line" attached as Appendix "A" to the report, but there is no evidentiary foundation whatsoever for this claimed line of boundary. No data or evidence was produced to support this line at the original trial in the District Court in 1989, nor could Mr. Smith produce any data or evidence to support the line during the supplemental hearings, despite being given ample opportunity and after repeated requests on cross-examination for information of any type which might provide some possible documentary basis to support Smith's verbal opinion. Moreover, Smith admitted on cross-examination that his boundary line was between 7,000 to 8,000 feet (5 Sup. Tr. 100-128) too far to the west from the true thalweg in the various years that he from time to time picked in the two trials, 1949-54 (5 Sup. Tr. 111-120, 143, 146), to claim an avulsion had occurred. This error represents virtually the full width of the Mississippi River and very obviously means the Smith Line is in the wrong location, being located on top of the west bank (Louisiana) instead of adjacent to the east bank of the river (Mississippi).

In this regard, the Special Master neglected to mention that the "Austin Smith Line" follows along the Louisiana levee and transects property owned and occupied historically by Louisiana riparians who have farmed it since just after the turn of the century, as they testified in the Supplemental Hearing (Surles, House, and Walters). Similar testimony was offered in the original trial by Louisiana (Deloney, Reed, etc.), but Mississippi offered none. In truth and fact, no Mississippi people have ever had anything to do with the disputed area in Louisiana, except to try and hunt there. There have been no residences established, except by Louisianans, no farming ex-

cept by Louisianans, no law enforcement except by Louisiana Wildlife and Fisheries agents and the Louisiana sheriff, and no taxes paid on the disputed area except by Louisianans to the Louisiana tax collector in Lake Providence, Louisiana.

The findings and conclusions of the Special Master are not supported by the data and evidence, and applicable law is improperly applied. It is submitted that the Master was overwhelmed by the complexity of the evidence and apparently elected to follow the reasoning of the District Court or possibly some broadly conceived subjective notions of equity in lieu of confronting and giving proper analysis to the scientific and technical factual issues before the Court.

The parties have invested a huge amount of time, energy, resources and money on this matter and are entitled, therefore, to have a proper decision by application of the controlling rules of law to the proven facts.

II.

MOTION FOR ORAL ARGUMENT

The State of Louisiana, through its Attorney General, further moves the Court, in view of the importance of this litigation to Louisiana, that this case be set for oral argument after all briefs have been filed.

III.

PETITION FOR NEW TRIAL OF THE SUPPLEMENTAL HEARING

The State of Louisiana respectfully prays for a new trial of the Supplemental Hearing held before the Special Master appointed by the Court on March 7, 1994.

ARGUMENT

For the same reasons stated in the Exceptions to the Report

of the Special Master, it is shown that the Special Master has apparently misunderstood, and, therefore, totally misconstrued the facts presented before him, much of which was a supplementation of prior testimony by further very clear, explicit and detailed expert testimony of new Louisiana witnesses. Additionally, as shown by the Final Report of the Special Master, many additional exhibits were offered by Louisiana which carefully and explicitly depicted the progression of events within the Lake Providence Reach of the Mississippi River over the entire period of recorded history.

It is submitted that the case should be decided on proven facts supported by documentary evidence, based upon applicable rules of law and definition.

It is further submitted that there is no evidence to support the findings and interpretations of the Special Master as a consequence of testimony and evidence adduced at the Supplemental Hearing.

In view of the special importance of this litigation to Louisiana and the other parties, it is submitted that a new trial of the Supplemental Hearing should be granted in the interests of fairness, justice and equity for the parties.

IV.

EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

The State of Louisiana excepts to the report of the Special Master now before this Court in the following particulars:

A.

The Special Master erred in finding that a frozen boundary thalweg may remain ambulatory and may be "pushed" by bar and shoal accretion building in the river. See pages 12 and 25 of the Final Report; footnote 3, infra, p.12.

B.

The Special Master erred in ignoring detailed hydrographic data and the unrefuted testimony of Louisiana's experts explaining the data which shows conclusively that Stack Island washed away completely in at least three different time periods:

1) Prior to the sovereignty of either state in 1812 and 1817;
2) In 1883;
3) In 1948.

The bed of the Mississippi River was scoured clean of this feature in each of these years.

C.

The Special Master erred in refusing to acknowledge the applicability of federal law and standards defining islands, for example, the following:

1) An island is "a body of land extending above and completely surrounded by water at mean high-water." U.S. Coast and Geodetic Survey; (LA-PT-2)
2) An island must be "above the mean high-water elevation of any meanderable body of water, * * *." Department of the Interior; and (Mayeux, Sup. Tr.; 43 U.S.C. 1301)
3) An island must be higher than "top bank" elevation of the river or ordinary high water. Industry definition used by river engineers at the U.S. Army Corps of Engineers and throughout the world. (Winkley, Sup. Tr.)

The Special Master erred by inconsistently applying subjective and arbitrary notions concerning the definitional criteria for islands, confusing them with bars and shoals, so as to force pre-determined conclusions concerning Stack Island, Providence Bar, the disputed area and accretionary landforms south of the disputed area.

D.

The Special Master erred in simply adopting by reference the "Austin Smith Line" (Appendix "A" to the report) which is unsupported by any technical evidence or data, and contrary to all controlling technical evidence, data and testimony from the experts, including the admissions of Mississippi's Austin Smith.

E.

The Special Master erred in misconstruing and misapplying applicable rules of law.

V.

ARGUMENT

A. STATEMENT OF THE CASE

The defendants in this case, the State of Mississippi and the Houston Group, continue to claim accretion along the west bank of the river at Lake Providence, Louisiana, including batture lands which have been used historically for farming by Louisiana riparians who have proven clear title and the payment of taxes on these lands since the time of Louisiana's sovereignty (1812). In fact, as shown at the original trial in the District Court and at the Supplemental Hearing, the "Austin Smith Line" transects Louisiana farmland on the river side of the Louisiana levee which was never washed away or re-built by the river. Robert Jarvis, a member of the Houston family and only one of three witnesses for the Mississippi interests at the Supplemental Hearing, does not dispute this, but feels that since he has hunted in the general vicinity from time to time and has walked across some of these properties, he has a good claim of ownership (4 Sup. Tr. 210 et seq.). The Louisiana owners, of course, disputed these claims at both hearings.

This case involves the boundary between the States of Mississippi and Louisiana in the vicinity of an island located in the

Mississippi River known as "Stack Island" or "Island No. 94." However, the only true island in existence in the near vicinity of the dispute is an extremely large island which has developed at the geographic location of original Island No. 94 in 1881. This island is clearly shown on various Louisiana exhibits, such as LA-1A, a U.S. Geological Survey Quadrangle Map. Also shown on the map is the 1881 location of the island patented to petitioners in 1888, being only 117.96 acres in size at the time. Later, it washed away entirely as shown by the ample testimony, documentary evidence and holding of the trial court in this case. That court, of course, also held that the island had migrated across the river, but did not discuss the "new" island in the river at the location of Island No. 94 in 1881.

It is noteworthy that after its disappearance in 1883, no later map again referred to "Island No. 94." After the reappearance of a new island the next year, it lost the No. 94 designation and became simply "Stack Island."

Mississippi and the Houston Group do not like to address the principal object of their claim - the accretion along the west bank of the river at Lake Providence, Louisiana. They are quite careful to avoid detailed factual matters and confine the argument largely to broad-brush legal principles found in the case law, without applying them to the specific facts of this case.

The accretionary features are a part of the west bank of the Mississippi River at Lake Providence, Louisiana (P- 1, P-2, LA-1, LA- 1A) and are entirely different formations from the Island No. 94 location. They are located in a different geographic vicinity; they have different histories of origin; they are different in size and shape; and at all times since their formation in the 1930's, have been west of the boundary between the States of Louisiana and Mississippi. They are connected to and are a part of the Louisiana bank and have no island features whatever, except at extreme high water. The designation of these accretions as "Stack Island" on some maps is due to the work of

draftsmen seeking to give the area a name.

While the Houston Group is asserting ownership to this bank accretion on the Louisiana side, they have carefully avoided any discussion of it from the very outset of the case, except to call it "Stack Island." There are actually two separate geographic locations at issue, to wit:

(1) The accretion to the west bank of the river at Lake Providence has sometimes been referred to as "the island" or "Stack Island," as it appears to be an island at extreme high water; and

(2) The "new" island which has developed at the precise geographic location of original Island No. 94 and is known and mapped as "Stack Island."

The trial court also avoided discussing the fact that there are two separate geographic locations at issue by not specifically referring to them. The Special Master did refer to the "new" island, but did not mention that it is in the precise location of Island No. 94, northeast of the disputed area and adjacent to Mississippi.

Under cross-examination in the District Court trial, Mississippi's expert, Austin Smith, drew a sketch on P-2 of the accretion against the west bank of the river (Tr. 409-410), and on P-1 drew the original Stack Island as of 1881 (Tr. 412). His testimony shows that prior to the avulsion of 1881, the island was located geographically in T 11 N, R 9 W of the Choctaw Land District, Mississippi, while the accretion against Lake Providence on the west bank of the river is located in T 21 N, R 13 E of the Red River Land District, Louisiana (Tr. 412). Further, Austin Smith admitted that the original Island No. 94 and "Stack Island" which has accreted to the west bank, as claimed by petitioners are not "one in the same," as he had earlier testified. (Tr. 461-463.)

The District Court referred to the "migrating Stack Island"

in the bench opinion of June 23, 1989, page 16. That court correctly found, as Louisiana contends, that the island "was eroding and accreting and migrating generally in a southwesterly direction, by 1954 had moved out from under any portion of the superimposed original island and therefore had disappeared * * *." In the Supplemental Hearing, it was shown that Island No. 94 had been completely scoured or washed away completely in 1811, 1883 and 1948, re-building in the interim periods and in 1954 at the 1881 location, as it is today.

The State of Louisiana contends, as set forth in paragraph 7(d) of the Pre-Trial Order filed in No. 91-1158 (Tr. 664-665), that Island No. Ninety-four (94) in the Mississippi River patented by the United States on December 29, 1888 to Stephen B. Blackwell, located in Township 11 North, Range 9 West of Choctaw Meridian in Mississippi, containing 117.96 acres was eroded away by the natural processes of the Mississippi River, subsequently re-formed as "Stack Island" and currently exists at its location at the time of the federal patent. It is not, however, to be confused with accretion to the west bank, which occurred commencing in the 1930's, at the same time Stack was rebuilding in the 1881 location, only to be washed away again in 1948.

Mississippi's expert, Austin Smith, drew a boundary generally along the Louisiana levee on the west bank in order to capture ownership of both the accretion to the west bank, as well as the new and extremely large island located in the river proper at the 1881 location of the island. The accretion to the west bank has been assimilated into the land mass along the west bank, and was so found even by the district court. In its Bench Opinion of June 23, 1989, the court found that this accretion to the "Louisiana shore" is "for large portions of the year completely dry between what is called the island and what is called the high bank on the Louisiana side," making it a part of the bank.

Mississippi and the Houston Group are claiming possession, jurisdiction, and sovereignty of both the land accreted to Louisiana and to the "new" Stack Island near Mississippi. Hence, the Fifth Circuit characterization of the boundary dispute as "treacherous."

In the district court and the Fifth Circuit, defendants have claimed that two avulsions occurred in the Mississippi River in the vicinity of Lake Providence, but failed at both trials to present testimony or evidence of either. The Lake Providence Reach of the river is straight in its alignment, making an avulsion extremely unlikely without the intervention of man-made works, such as the 1881-1882 Mississippi River Commission dike project which Louisiana clearly established from U.S. Government documents.[2]

The Special Master failed to recognized that since Mississippi and the Houston Group could not show a thalweg boundary against the Louisiana levee, actually claimed by them to be located on fast land, and could not produce any map or data showing how it might have been frozen there, they simply have no claim.

B. THE APPLICABLE LAW OF THALWEG BOUNDARIES

During closing argument and briefing following the Supplemental Hearing, the Special Master asked the parties to assume for purposes or argument that he would follow the District Court and rule in favor of the Mississippi parties to the extent of holding that the northern portion of the disputed area is traceable uninterruptedly to the Stack Island of 1881, transformed in location and area by the forces of accretion and erosion.

In response to the Special Master's inquiry concerning this

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[2] See Statement of the Case from Brief In Opposition By The State of Louisiana and The Lake Providence Port Commission and Brief for Respondents in No. 91-1158, setting forth these same facts.

view of the findings of Judge Barbour,[3] it is to be noted that the lower court took the view that any accretionary feature labeled on a map as "Stack Island" was in fact and in law an island, regardless of its characteristics, elevation or location. The Special Master accepted this view and implicitly rejected applicable principles of law pertaining to features such as banks, bars, shoals, and islands, as well as the correct meaning of "avulsion" and "boundary thalweg."

Proper adherence to applicable technical definitions and rules of law is essential to a correct decision in a case of this type. Both the District Court and the Special Master viewed sand waves, bars and shoals in the bed of the river as islands, even though they did not protrude above low water, were ephemeral, transitory, constantly changing and evolving and moving with the massive current of the river. To treat sand waves, bars and shoals as a true island distorts the factual evidence presented and causes a misapplication of the rules of law. In this regard, the Special Master has correctly recited the legal principles defined by this Court in four of the prior cases between the two states, as recited at pages 11 and 12 of the Final Report, those being *Louisiana v. Mississippi*, 466 U.S. 96 (1984); 384 U.S. 24 (1966), *reh'g denied*, 384 U.S. 958; 282 U.S. 458 (1931); and 202 U.S. 1 (1906).

At page 12 of the Final Report, the Special Master also further states the Island Exception to the rule of thalweg, citing *Indiana v. Kentucky*, 136 U.S. 479, 508-09 (1890), and *Missouri v. Kentucky*, 78 U.S. 395, 401 (1870). Thereafter, quite mistakenly, the Special Master applies the rules from *Arkansas v. Tennessee*, 397 U.S. 88, 90 (1970), and *Arkansas v. Tennessee*, 246 U.S. 158, 175 (1918) to the facts of this case. Those two cases, however, arise out of factual circumstances dramatically different from those of the case now before the Court.

[3] See letter of Special Master of October 5, 1994, and 5 Sup. Tr. 210-220, wherein the Special Master begins to follow the District Court view that Stack Island had continuous existence and accretes to the west, "pushing" the secondary channel/frozen channel/boundary thalweg (?) toward Louisiana and against the Louisiana shore. Actually, the live thalweg and downstream track of navigation was against the Mississippi bank for *all* relevant periods of time, particularly those years 1949–1954, chosen by Austin Smith to be the time of avulsion which purportedly froze the boundary along the Louisiana bank. This was clearly shown by the Winkley hydrographic exhibits, being Corps maps for all periods.

Each of the cited cases dealt with classic avulsions. In the 1970 case, an avulsion occurred leaving Tennessee lands on the Arkansas side of a **new channel**, while water in the former thalweg became stagnant so that the processes of erosion and accretion no longer occurred. In this situation, the boundary between the states became fixed in the middle of the old abandoned channel, while the active river left this former channel, formed a new bed, new banks and moved to a new location.

The same thing occurred in the 1918 case, in which roughly similar events occurred. None of these events occurred in the case now before the Court in the Lake Providence reach of the river.

It is submitted that the Special Master clearly exceeded the holding in these cases by suggesting that a frozen boundary continues to be ambulatory in nature (Final Report p. 12) and that such a principle applies to this case. In the Lake Providence reach of the Mississippi River, the bed has been continuously covered with flowing water from east bank to west bank throughout all of recorded history. All known maps, photographs and hydrographic data show the thalweg meandering back and forth within its bed, but entirely within the banks of the river, ergo, the river has not abandoned a former bed, cut a new channel or established new banks, nor has a former channel ever attenuated and gradually ceased to flow, as in the cases cited by the Special Master. Therefore, there can be no frozen boundary, nor an "ambulatory frozen boundary" to be

"pushed" toward Louisiana. There is no evidence whatever to show such an occurrence in this case. While Mississippi witness Austin Smith claimed two avulsions occurred, he admitted that the river never cut through its banks and never made a new bed (5 Sup. Tr. 93–100), basing his claim on "enlargement" which never occurred.

The Louisiana experts (Easterly, Mayeux and Winkley) carefully explained the condition of the River through the presentation of exhibits for all pertinent periods of time. Mississippi and the Houston Group did not attempt this in any fashion.

C. TREATMENT OF EXPERT TESTIMONY

Questions concerning the location of the boundary between the States of Louisiana and Mississippi in the Lake Providence Reach of the Mississippi River, require a proper understanding of (l) the terminology of fluvial or riverine boundary determinations, especially the definitions and distinctions emerging from the various decisions of the U. S. Supreme Court and treaties to which the United States is a party, (2) the relevant alluvial forms and fluvial processes, i.e., geomorphology and hydrology, and (3) the evidence provided by historic cartography and related archival materials, including government reports or documents. The State of Louisiana embraced these matters in the context of its evidence and expert testimony. Unfortunately, the intricate, detailed, and sometimes subtle scientific and technical presentation proved overwhelming to an otherwise observant Special Master.

Judge McKusick's failure to grasp the terminology and essentials of river processes in the Lake Providence Reach necessarily produces his clearly erroneous conclusions on several critical points of determination. Mr. Winkley, an experienced hydrologist, devoted so much time at the trial, and Dr. Easterly, an alluvial geomorphologist, discussed in prepared testimony,

the dynamics of the Mississippi River and the nature of recurrent accretionary features. The Special Master, however, either did not comprehend that extensive testimony and considerable evidence, or simply chose to disregard it.

What Judge McKusick has done is to substitute his own views and lay opinion for that of the experts, whose education, professional credentials, experience, reputation and integrity were unchallenged. For instance, Winkley (LA-PT-1), Chief Hydrologist and Potamologist for the Corps of Engineers (river engineering, geology, river hydrology, and potamology, 2 Sup. Tr. 122); Easterly (LA-PT-2), (political geography, boundaries, alluvial geomorphology, 3 Sup. Tr. 289); Mayeux (LA-PT-4), Registered Professional Land Surveyor, Mississippi, Arkansas, Texas, and Louisiana (expertise in boundary location, title abstracts, possessory acts and hydrographic surveys, 4 Sup. Tr. 5 et seq.)

The experience and reputation of these witnesses is such that they were accepted as experts in their fields without question (Winkley at 2 Sup. Tr. 123); (Easterly at 3 Sup. Tr. 289); except as to Mayeux's prepared testimony which was questioned but unrefuted (4 Sup. Tr. 8-85).

It is therefore submitted that Judge McKusick's view of the evidence, being a mere substitution of his lay opinion for that of the experts, is an impermissible view.

It might prove helpful, however, to note the words of a Special Master who did appreciate the dynamics of the Mississippi River in his report (at page 2) for *Tennessee v. Arkansas, No. 77 Original*:

> Maps do not do justice to the true scale of the river. The larger island areas are miles long. The river is extremely wide. During high water or floods the river can erase or build a very large land mass in a matter of days. The river's water level is very changeable. At low water many bars may protrude from the river's bed, islands

may seem to increase greatly in size because of exposed adjoining sand and mud flats, and chutes where water other times may flow are completely dry and passable by foot. At higher water stages the bars are no longer visible, only the more elevated portions of islands remain above the water surface and water flows in the chutes, dividing what formerly seemed to be a single piece of land. At flood stages, the river may completely submerge all land masses within its banks.

What the Special Master, Judge Earl R. Larson, found to be the reality of Plum Point Reach proves equally true of Lake Providence Reach. The sheer size of the river, with a width of more than a mile, the enormous volume of flow and the daily changes which occur must be seen and studied to be appreciated (See prepared testimony of Winkley and Vols. 2, 3 and 5, Sup. Tr.)

Accretionary features, in the forms of shoals, sand bars, and islands, continually form, evolve, disappear, and reform in "recurrent approximate relational positions." In that way, an accretionary feature (sometimes described as "Providence Bar") appears along the west bank (Louisiana) of the lower Lake Providence Reach in 1770, 1821, 1836, 1849, 1856, 1861, 1874, 1884, 1907, 1930, 1933, 1950, and 1952 (by which time that island mass has combined with other accretion comprising the "Disputed Area").

Throughout the same time period, Island No. 94 or Stack Island, similarly, disappears in 1811, reforms as a mere "bar with a few willows" by 1817, remains "only a dry sand bar" by 1825, forms as an island above ordinary high water by 1881 (see Prep. Test. of Dr. Easterly, LA-PT-2), disappears by 1883 (see Mayeux and Winkley, Sup. Tr.) and reforms as a moving mass of alluvion which eventually appears to locate as a bar (because it only appears above low water) near the vicinity of the sometimes "Providence Bar" and in the place of eroded Louisiana riparian land.

In the District Court, Judge Barbour unfortunately failed to appreciate the evolving character of the accretionary features existing in the Lake Providence Reach. The Special Master in the instant case adopts the District Court's error. In the former's "Bench Opinion," for example, Judge Barbour characterizes Lake Providence Bar as a bar merely because it is so named on a map (apparently unaware of the hazards of relying too greatly on generic place-names). More significantly, however, he considered Stack Island to be an island because it appeared above low water (a proper definition for a bar, but not for a true island!). Such characterizations reflect a failure to understand the changing and recurring character of actual accretionary features and a misplaced reliance on generic place names. (In Judge Barbour's defense, however, he did not have the benefit of Mr. Winkley's extensive three-dimensional study of the Lake Providence Reach, together with the information as to both depths and elevations of various accretionary features, whether generically termed "bars" or "islands."). Judge McKusick compounds this erroneous confusion of terms.

An island, of course, is properly defined as "a body of land extending above and completely surrounded by water at mean high water." (See for example, Prep. Test. of Dr. Easterly (LA-PT-2, p. 16) and the Trial Testimony of Mr. Mayeux). Anything less than dry at mean or ordinary high water, constitutes a bar or something other than a true island, no matter its former character.[4] A moving mass of accretion, for instance, does not an island make! (even if it appears to extend from a former island location).

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[4] A significant problem that occurs in the evaluation of maps is the need to know the surface water elevation of the map. At low water and middling stages, all features showing above water would seem to be islands when they may actually be bars or shoals and would be submerged at higher stages.

All recognized definitions of "island" contemplate "a body of land extending above and completely surrounded by water at mean high water." This is the definition adopted by the U.S. Coast and Geodetic Survey, by the Department of the Interior, Bureau of Land Management (LA-SE-122) and by the United States Code, 43 U.S.C. 1301, defining lands beneath ordinary high water as constituting the bed and bottom of navigable waters. This was also briefed at page 15 of the Trial Brief Of The State of Louisiana. Thus, only the portion of a feature above high water is an island (see No. 77 Original, Judge Earl R. Larson, p. 15 supra).

The definition of "island" is routinely followed by the United States in both domestic and international law and practice, and customary international law. This definition, as derived from international law, is applied by the United States government in delimiting its jurisdiction with the states in coastal areas, as well as inland. (See for example, U.N. Convention On The Territorial Sea and Contiguous Zone, Article X, which defines an island as a naturally formed area of land, surrounded by water, which is above water at high tide. The United States is a party to this convention and has applied this definition in the several Tidelands cases.)

The Supreme Court of the United States has adopted, confirmed and applied federal definitions, such as that of the U.S. Coast and Geodetic Survey, in decisions involving matters of this type, as in *Borax Consolidated v. city of Los Angeles*, 296 U.S. 10, 56 .Ct. 23, at 29 (1935).

The Supreme Court of the United States, in deciding *Texas v. Louisiana*, 410 U.S. 714, 93 S.Ct. 1215 (1973), at page 1221, discussed island criteria, and cited the earlier case of *Scott v. Lattig*, 227 U.S. 229, 33 S.Ct. 242 (1913), with favor as concerns the proper definitions to be applied to features such as islands. In *Lattig*, the Supreme Court held that an island has "well defined banks extending from 3 to 5 feet above high water" citing cases

in the coastal areas which applied definitions similar to those employed by federal agencies such as the U.S. Coast and Geodetic Survey. The *Lattig* case arose out of a dispute in an inland navigable river, the Snake River in Idaho, similar to the matter now before the court.

In *Burford v. Sun Oil Co.*, 319 US 315, 63 S Ct 1098 (1943) this Court, at least in dicta, recognized that "geologic realities" of a highly technical nature must be granted some deference. Also, the Court refers to "geological-legal problems of novel nature."

Mr. Winkley, Chief Hydrologist and Potamologist for the U.S. Army Corps of Engineers (Retired) and a resident of Vicksburg, a Louisiana witness of national and international stature, followed the practice of river engineers in defining an island in terms of "top bank," a substitute and technical equivalent of "mean high water." (2 Sup. Tr. 189, 264, 266). (See also, LA-SE-122, Manual of Instructions for the Survey of the Public Lands of the United States, 1973, page 22, "Every island above the mean high water elevation of any meanderable body of water, except islands formed in navigable bodies of water after the date of admission of a State into the Union, * * *.") Perhaps, Judge McKusick could have avoided running aground of the Wachusetts Bar, a site of steamboat wrecks prior to 1883, if he had properly considered *City of St. Louis v Rutz*, 138 U.S. 226 11 Sup. Ct. 337, at 346 (1891).

A comparison of the facts of *City of St. Louis v. Rutz* with those of the Lake Providence Reach proves most instructive. In the former case, the dispute focused on the ownership of an island considered by some to have relocated from near the bank of Missouri down the river to a new location in the area of eroded former riparian land of Illinois. That island, first known as "Quarantine Island" (because of its use as such by the city of St. Louis), was surveyed in 1853. Ten years later, in 1863, the island, then known as "Arsenal Island" (because of

the presence of a U. S. Arsenal), was again surveyed. It was then designated as "St. Louis School Lands" containing in excess of 109 acres. By contrast, Island No. 94 disappeared in the New Madrid Earthquake of 1811. It reappeared as a mere bar, not a true island, and remained such until shortly before its first survey in 1881. Stack Island's short tenure as an island proves insignificant compared with the more stable landmass of Quarantine or Arsenal Island.

Arsenal Island, subsequent to 1863, began to erode at its upper end and accrete below, thereby appearing to "migrate" southward to the Illinois side of the Mississippi River. However, during that time, Arsenal Island became "a mere moving mass of alluvial deposits." In the words of the Court, "to such a movable island, traveling for more than a mile, and from one state to another, the law of title by accretion can have no application."

In the somewhat related case of *Carrick v. Lamar*, 116 U.S. 423 (1886), the Court noted that, by 1883, the former Arsenal Island could not be surveyed again, because of its "drifting character" and lack of "stability and permanence." Indeed, at that time, an individual settled and farmed the island of 230 acres. Nevertheless, the Court observed that "even during the time of a survey what would be a monument and a boundary today might require change tomorrow, and that, therefore, as long as the same causes continued to operate and make the island a mere moving mass of alluvial deposits, it was useless to establish corners and monuments, which would be subject to immediate obliteration."

Judge McKusick rejects the view pronounced by this Court at page 24 of the Final Report.

Much less could be said for the character of Island No. 94 after 1881–1882. By 1882, an alluvial tail, being merely an attached bar, extends downstream from the former Wachusetts Bar.

Note from the exhibits that the alluvial bar-tail is attached

to Wachusetts Bar, not the 117.96 acres surveyed as Island No. 94. This was also misconstrued by Judge McKusick, who believed that anything shown on the map was an island and, this being so, was a part of Stack Island. Thus, Wachusetts Bar, attached to Island No. 94, and the alluvial bar-tail attached to Wachusetts Bar are seen by Judge McKusick as "one big island," when only the 117.96 acres of it is above high water. This is critical to his belief that there was continuous existence — as the part actually surveyed (117.96 acres) was scoured away, the low elevation tail migrated south and lived on as an island in the mind of Judge McKusick. Parenthetically, even the tail washed away, as Austin Smith admitted.

Within the following year, 1883, both island and accretions are washed away, replaced by the newly scoured steamboat channel, as established by the Mississippi River Commission (See LA-SE-159).[5] A subsequent, moving mass of alluvial deposits formed, (just as it had after the New Madrid Earthquake of 1811 and just as it did in the formation of the more recent "Stack Island II" or "Rabbit Island," also known locally as "Louisiana Bar"). In an odyssey across the Mississippi River, Stack Island dissipated into an agglomeration of shoals and bars, not unlike Providence Bar beyond. However, during that time, it could by no means be classified as an island. It lacked elevation, permanence and stability. It could not be surveyed nor monumented. Eventually, some bar accretions accumulated on the Louisiana side of the river, combining with rem-

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[5] At page 19 of the Final Report, Judge McKusick seeks to explain away LA-SE-159, an original 1881 Mississippi River Commission map made by Captain Marshall, base map 1881, with hydrography added in 1883. Mississippi witness Austin Smith admits that the map is authentic, 5 Sup. Tr. 150-160, and that the steamboat channel (main navigation channel) is authentic, 5 Sup. Tr. 156. Neither is able to comprehend or admit the meaning of the legend information inscribed on the map explaining the use of map symbols or the difference between the 1881 base map and the 1883 hydrographic data

nants and reformations of accretions sometimes identified as "Lake Providence Bar" or Louisiana "Island No. 7." By the late 1960's, a new island named "Stack Island" had reformed at the original 1881 location and it is there today.

In *City of St. Louis v. Rutz*, supra at 346, the Court carefully excluded any effects for the "Island Rule," to wit:

> . . . We must not be understood as implying that if an island in the Mississippi river remains stable in position, while the main channel of the river changes from one side of the island to the other, the title to the island would change because it might be at one time on one side and at another time on the other side of the boundary between two states. The right of accretion to an island in the river cannot be so extended lengthwise of the river as to exclude riparian proprietors above or below such island from access to the river. (Emphasis added)

The same could be said for Stack Island and Lake Providence Reach. There, not only did the island not "remain stable in position," it entirely washed away by 1883. Even if it had not washed away by 1883, after that time, Stack Island was never again an island with elevations above the ordinary high water mark. It was, indeed, merely a "moving mass of alluvial

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added after river survey two years later, showing the sailing channel to be 1,500 feet wide and passing directly over the former location of the island. Compare with testimony of Michael P. Mayeux, 4 Sup. Tr. 138 et seq. in which he discovers that Mississippi listed the same map in the original trial, but did not use the updated 1883 version showing the island had been washed away and that the main channel of the river now passes over it. See also, 24 feet of water covering the surveyed location at low water, 59 feet at high water, 4 Sup. Tr. 182–186. Compare with testimony of Brien R. Winkley explaining the meaning of the 1883 hydrographic data in detail, 5 Sup. Tr. 6-42, and the preparation in Court of LA-SE-159-A, a cross-section showing the depth of the river at the former location of the island, 5 Sup. Tr. 42. "The map is authentic," 5 Sup. Tr. 49.

deposits"!

Nor does *Arkansas v. Tennessee*, 397 U.S. 88 (1970), provide help to the problem of Lake Providence Reach. The premise that an old channel might continue to wander as long as it carries some water flow, applies to a case where the main channel moves because of a true avulsion. Such simply did not happen in the Lake Providence reach. The chute channels along the Louisiana bank were never the main channel. And the more recent case of *Tennessee v. Arkansas*, No. 77 Original, (referenced above) proves of limited value (although at first glance, deceptively similar to the present case) because the "migrating" islands in that case were not washed away and always reappeared after the floods in essentially the same position. Rather, the river shifted around islands as they extended their accretions.

To summarize, therefore, Island No. 94 disappeared in 1811 and did not again become a true island worthy of survey until about 1881. Shortly thereafter, it again disappeared as an island, became a moving mass of low elevation alluvial deposits, which gave the illusion of appearing to eventually occupy locations containing recurrent accretionary forms always claimed by the State of Louisiana and its assigns, namely, Providence Bar on the Louisiana bank. Those alluvial deposits came from upstream, not Stack Island, and combined with remnants of Providence Bar and the Louisiana bank. They only show on "maps, mosaics and aerial photographs" at times of low water and are otherwise submerged (See Final Report, p. 17). This is why the deposits are called accretion to the bank and not islands.

Remarkably, Judge McKusick employs an unusually subjective classification to accretionary features, defining "islands" in terms of their "degree of permanence" (Final Report, p. 23). If one aspect of "Stack Island's" history proves evident, that is its total lack of permanence. (Indeed, how can

a "migrating" mass of constantly changing size and shape be considered "permanent"?) Even so, while rejecting legal, scientific and technical definitions of "islands" and employing a definition broad enough to include various low-water landforms, such as "bars," the Special Master relies on Judge Barbour's determination that similar accretionary features which exist below the Disputed Area should not be considered "islands" but "bars" so as to render them accretions which could subsequently "attach" to Stack "Island" (Final Report, pp. 26-27, footnote 12). Such patent inconsistency defies all reason and common sense! Any attempt to subsume the latter features under Mr. Smith's dubious and contradicted notions of "confluence accretions," presented only in the district court, (cf. Joint Appendix, vol. II, pp. 165-166) does not alleviate the highly subjective and arbitrary use of these terms.

To call a moving mass of accretion from 1883 to fairly recent times an "island" and then classify "Providence Bar" and other locational features as something other than islands shows rank disregard for the use of proper definitional criteria. This proves both logically inconsistent and disregards the realities as understood (and testified) by the several disciplines represented by the experts, i.e., geography & geomorphology, hydrology, and surveying. At professional meetings of the latter, such ignorance and disregard of the scientific and technical aspects of this case would surely be displayed as an object of ridicule and criticism. Even so, the ever-changing definitions of "bars" and "islands" by the Special Master (but not, interestingly, the Fifth Circuit [See *Houston v. Thomas*, 937 F.2d 247 (5th Cir. 1991), footnote 2.)] in an obvious procrustean effort to force a pre-determined legal result is without excuse.

It is notable that the river had been swept clear of even bars or shoals by 1948, as shown by the Corps hydrographic survey

(LA-SE-20).[6] There is nothing left in the bed of the river but sand waves and bed forms. Mississippi and the Houston Group did not contest this evidence, nor did Austin Smith, but attempted to seize upon a long low bar just beginning to develop in 1949 as "Stack Island."

It should be obvious that since a bar is not an island, the "Island Rule" cannot apply. Thus, a developing bar cannot "push" a minor chute or a purportedly frozen thalweg. Parenthetically, since there was no island in 1948 and the thalweg was against the Mississippi bank at this time, as shown by the Corps hydrographic surveys, there can be no frozen thalweg to be "pushed" toward Louisiana as the bar feature, Providence Bar, reforms.

The burden has been on Mississippi and the Houston Group to show both a (1) true island and (2) continued existence as such through time. Snap-shot photo overlays from different years of bar features seemingly connected or overlying one another do not satisfy either requirement. Basically, the overlays show only a bar in one year, while in existence at that time, overlying a nearby location at a moment in time in yet

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[6] At page 21 of the Final Report, Judge McKusick blatantly dismisses a series of 1948 Corps of Engineers hydrographic surveys (LA-SE-20A, B, C and D) which show at least 25-30 feet of water covering the highest point in the river at that time, ergo, no islands are in existence. The stated basis for rejection of this hard evidence is that no "local observers" reported such, but to whom? The Master also confuses the testimony of Mississippi witness Burkhardt concerning the age of trees shown in the field notes from the 1881 survey of Island No. 94, an area some 6 miles distant from the disputed area and 67 years earlier in time (1948–1881 = 67). The Master also suggests that elevations five feet higher than ordinary high which re-built after high water in the following year, 1949, give credence to the continued existence of an island. This high point, however, was the single highest point in the river in 1949, being a tiny area of high elevation on top of a bar. If the reading is based on the Vicksburg gauge and not the Lake Providence gauge, even the single high point is under water.

another year. This technique proves nothing in terms of elevations to meet the island requirement, or continual existence.

Mr. Winkley clearly testified that there were no islands in the Lake Providence Reach as of 1883 or 1948 (3 Sup. Tr. 264–266), as did surveyor Mike Mayeux (4 Sup. Tr. 141–145). Thus, whatever formed later west of the active main navigation channel belongs to Louisiana. This testimony and evidence is unrefuted in the record of the case, except possibly by the Special Master, and it is an impermissible view on his part. Mississippi certainly had no witness willing to challenge the Corps data, nor Winkley, nor Mayeux, in their explanation of the specific details of voluminous maps and hydrographic surveys. While the Mississippi lawyers cross-examined, no Mississippi witnesses were called, except Austin Smith. He was never asked by his lawyers to evaluate and discuss this hard data.

All of the evidence in the record shows that after 1882, all of the features in the Lake Providence Reach of the river were bars and not true islands. Even now, the disputed area against the west bank of the river at Lake Providence is below ordinary high water or mean high water or "top bank," as the Special Master was personally shown during the site visit by boat on May 5, 1994. That is, the entire disputed area was covered by at least thirty (30') feet of water at ordinary high on the day of the visit, well below flood stage, for a significant period of time, although the tops of very tall trees were emerging above water level.

Thus, a clear contrast is made between a feature such as the new Stack Island up river in its usual location near the Mississippi bank and the disputed area, which is nothing more than growing bank accretion even though there are minor channels through it which show in several places at low water caused by river action at both high and low water. See No. 77 Original, supra, and the comments of the Special Master, Judge Earl R.

Larson.

Both the Louisiana riparians and the State of Louisiana have exercised jurisdiction and possession of the disputed area. Neither Mississippi nor the Houston Group offered any evidence to show adverse possession, other than deer hunting activity by Robert Jarvis, as well as many other persons, including Louisianans. It must be remembered that Mississippi and the Houston Group called no witnesses in the Supplemental Hearing except Austin Smith and Robert Jarvis. In marked contrast, Louisiana produced numerous witnesses to show the clear exercise of use, occupancy, possession and official acts of sovereignty through the exercise of law enforcement activities, continued and uninterrupted. Mississippi showed none and called no one in an attempt to do so. The abundant lack of evidence concerning the claims of Mississippi and the Houston Group to adverse possession, acquiescence and title was startling: the only claimed use of the disputed area was hunting during deer season; there were no witnesses from any Mississippi agency or anyone else claiming sovereign acquiescence, and no title or tax documents pertaining to the Louisiana Land District (T21N, R13E of the Red River Land District) except those of Louisiana riparians. The disparity in amount and quality of relevant and probative witnesses and evidence put on by Louisiana, as contrasted to Mississippi, is overwhelming.

Louisiana's evidence, while lengthy, is clear, concise, directly on point, and based almost entirely on official government maps, reports and hydrographic surveys. It is, essentially, unchallenged and irrefutable. On the other hand, Mississippi's evidence consisted largely, particularly in the Supplemental Hearing, of photocopies of maps and current (1994) photography used in cross-examination of the Louisiana witnesses in an effort to show that from a one dimensional plan view (bird's-eye view) there was an island in the river. This type of approach will not show elevations, which is critical to determin-

ing character as a true island. Mississippi witness Austin Smith had no new or even supportive data to back up his opinions, and he said, generally, that he could not really remember what data he might have used in the District Court trial. This was Mississippi's only technical witness.

CONCLUSION

The Court is urged to carefully review and apply the facts in evidence in this case as developed by the Louisiana experts, Hatley Harrison, Ernest Easterly, Brien Winkley and Michael Mayeux, based on qualitative scientific analysis, historical research, calculations and data. The totally unsupported *ex cathedra* opinion of Austin Smith and argument of opposing counsel carry little weight by comparison.

Similarly, the extrapolation and adoption by both Judge Barbour and the Special Master of Austin Smith's dubious confluence bar theory, actually barely discussed in his original trial testimony, and placement of a frozen thalweg unsupported by any objective evidence near Smith's points 1 to 22, should be rejected. There is simply no evidentiary foundation.

The case should be decided on the proven facts supported by documentary evidence, based on applicable rules of law and definition, and without resort to ad hominem urging. If the Court finds that the thalweg was not frozen in the east chute channel (as maintained by Louisiana in the District Court and held by the U.S. Fifth Circuit in *Houston v. Thomas*), then the law, facts, evidence and even common sense dictate that the present live thalweg should be the boundary between the states. There is certainly no evidence that the interstate boundary should follow along Louisiana's levees and through the fields of its citizens.

It is submitted that there is no evidence to support Austin Smith's contentions and interpretations, and the findings of the Special Master are erroneous. It is the established jurisprudence under Rule 52(a) of the Federal Rules of Civil Procedure that a finding is "clearly erroneous," as here, when the reviewing court on the entire record and evidence before it is left with a definite and firm conviction that error has been committed. See *United States v. United States Gypsum Company*, 333 U.S. 364 at 395, 92 L.Ed. 746, 68 S.Ct. 525 at 542 (1948); *W.S. Shamban & Company v. Commerce and Industry Insurance Company*, 475 F.2d 34 (1973).

Louisiana prays that this Court will reverse the findings of the Special Master and enter its Decree here determining the locus of the Louisiana Mississippi boundary at issue to be described according to the geodetic coordinates prepared by Hatley Harrison and included in the Final Report as Appendix B. Alternatively, that the boundary be decreed to be the present live thalweg of the Mississippi River.

Respectfully submitted,

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